2
13pcp

959 (28) (26)

Nos. 06-340 & 06-549

OFFICE OF THE CLERK

In The
Supreme Court of the United States

NATIONAL ASSOCIATION
OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

STATE OF ARIZONA'S REPLY BRIEF IN SUPPORT OF PETITIONERS

TERRY GODDARD
Arizona Attorney General

MARY O'GRADY
Solicitor General

PAULA S. BICKETT
Counsel of Record
Chief Counsel, Civil Appeals

JAMES T. SKARDON
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-3333
Counsel for State of Arizona

TABLE OF CONTENTS

	Page
Argument	1
I. The Court Should Not Remand This Case to the EPA Because Its Approval of Arizona's Pollution Permitting Program, Which Was Based on Arizona's Compliance with the Requirements of the Clean Water Act, Was Legally Correct	1
II. Section 7(a)(2) Does Not Apply to EPA's Decision to Transfer Pollution Permitting Authority to Arizona	7
A. Because the Language of Section 7(a)(2) Is Susceptible to Different Interpretations, the Court Should Look to Its Legislative History to Determine Congress's Intent	7
B. This Court's Decision in *TVA v. Hill* Does Not Support Respondents' Construction of Section 7(a)(2)	9
Conclusion	10

TABLE OF AUTHORITIES

Page

CASES

Am. Textile Mfrs. v. Donovan, 452 U.S. 490 (1981) 2

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 4

Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 5, 8, 9

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 2, 3, 4

Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) 2

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 1

Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997) 5

TVA v. Hill, 437 U.S. 153 (1978) 8, 9, 10

STATUTES AND REGULATIONS

Endangered Species Act, § 7(a)(1), 16 U.S.C. § 1536(a)(1) 7, 8, 9

Endangered Species Act, § 7(a)(2), 16 U.S.C. § 1536(a)(2) ..... *passim*

Clean Water Act, § 402(b), 33 U.S.C. § 1342(b) ..... *passim*

5 U.S.C. § 551(5) 5

23 U.S.C. § 138 3

49 U.S.C. § 1653(f) 3

40 C.F.R. § 131.2 3

50 C.F.R. § 402.03 9

ARGUMENT

I. The Court Should Not Remand This Case to the EPA Because Its Approval of Arizona's Pollution Permitting Program, Which Was Based on Arizona's Compliance with the Requirements of the Clean Water Act, Was Legally Correct.

Respondents argue that the Court must remand this case to EPA without addressing the statutory construction questions because EPA's decision was based on "inconsistent interpretations of Section 7(a)(2)" of the Endangered Species Act. (Brief for Respondents Defenders of Wildlife, et al. [Def. Br.] at 22.) But Respondents fail to acknowledge or even address Arizona's argument that this Court should affirm EPA's decision based on the correct interpretation of the Clean Water Act and the Endangered Species Act even if its interpretation is different from EPA's interpretation of the relevant statutes. Because EPA's interpretation of Section 7(a)(2), by Respondents' own terms, is an interpretation of a federal statute, this Court should determine the correct interpretation of Section 7(a)(2) instead of remanding.

To support their argument that the Court must remand to the EPA under "fundamental principles of administrative and appellate review," Respondents do not cite to any cases in which this Court has remanded a question concerning the appropriate interpretation of a federal statute to the administrative agency. (Def. Br. at 25.) Instead, Respondents rely on decisions that reiterate the non-controversial principle that the Court will remand to the administrative agency when the agency has not provided an adequate explanation for a decision that it alone is authorized to make. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983)

(Because the Secretary of Transportation was required to issue motor vehicle safety standards and had rescinded crash protection requirements in its safety standards without offering any explanation, the Court vacated the rescission and remanded to the agency.); *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 744 (1985) (In determining whether the court of appeals had original subject matter jurisdiction over the Nuclear Regulatory Commission's orders denying citizen petitions to modify, suspend, or revoke the license of a nuclear reactor, the Court reiterated that the agency record should enable the reviewing court to evaluate the basis for the agency decision.); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 419 (1971), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977) (Court reversed the lower courts' ruling upholding the Secretary of Transportation's authorization of the expenditure of federal funds for the construction of an expressway through a public park because the record on review did not contain factual findings to support the Secretary's legally required determination that there was no feasible and prudent alternative route.); and *Am. Textile Mfrs. v. Donovan,* 452 U.S. 490, 539-40 (1981) (Court vacated and remanded the Occupational Safety and Health Administration's (OSHA's) promulgation of a wage guarantee requirement because OSHA failed to make the necessary determination or statement of reasons that the wage requirement was related to the achievement of health and safety goals.).

Here, EPA made the factual findings and determinations that were necessary for it to conclude that Arizona's pollution permitting (NPDES) program met the requirements of Section 402(b) of the Clean Water Act. (J.A. 237.) Respondents acknowledge that they never claimed that

Arizona's program did not meet the requirements of Section 402(b) of the Clean Water Act. (Def. Br. at 19 n.8.)[1] Because Respondents do not challenge EPA's factual findings or statement of its reasons that Arizona met the requirements of the Clean Water Act, the Court need not remand to EPA for clarification.

Respondents also argue that EPA's post hoc clarifications of its interpretation of Section 7(a)(2) cannot justify its approval of the Arizona pollution permitting program under the Clean Water Act. (Def. Br. at 24-25.) But EPA's clarification of its interpretation of a federal statute is not the kind of post hoc explanation that requires a remand.

In *Volpe*, the Court reversed the district court's summary judgment rejecting petitioners' claim that the Secretary of the Department of Transportation violated federal statutes when it authorized the expenditure of federal funds to construct an expressway through a public park without finding if there was a "feasible and prudent" alternative route. 401 U.S. at 405 & n.4 (quoting 49 U.S.C. § 1653(f) and 23 U.S.C. § 138). The Court found that the district court erred in relying on factual affidavits that the government respondents submitted in that court to support the Secretary's decision because the affidavits were "post hoc" rationalizations and did not constitute the whole

---

[1] Respondents point out that EPA has discretion under the Clean Water Act to "establish water quality standards that provide 'for the protection and propagation of fish, shellfish and wildlife.'" (Def. Br. at 7 [quoting 40 C.F.R. § 131.2].) However, EPA and the Fish & Wildlife Service (FWS) concluded that Arizona's Water Quality Standards would provide adequate protection to aquatic species and that oversight of the Arizona program would ensure that Arizona continued to meet Clean Water Act requirements, including those for the protection of fish, shellfish, and wildlife. (NAHB Pet. App. 615-16.)

record compiled by the agency. *Id.* at 419. In contrast, EPA's clarification of its interpretation of Section 7(a)(2) after the court of appeals issued its decision below is not EPA's attempt to provide factual findings or a statement of its reasons for approving Arizona's pollution permitting program – it is the agency's interpretation of a federal statute, which is readily subject to review by this Court.

Similarly, in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962), the Court rejected "appellate counsel's post hoc rationalizations for agency action" because it was an attempt to justify a decision that only the Interstate Commerce Commission was authorized to make, and the Commission had made no findings to support its decision. Unlike the situation in *Burlington*, EPA is not attempting to justify its approval of Arizona's pollution permitting program based on factual findings that are not part of the administrative record. Rather, it clarified its interpretation of Section 7(a)(2), which is a legal interpretation that this Court may review.

Respondents also argue that it is unfair to affirm EPA's decision based on its clarified interpretation of Section 7(a)(2) because they have "been severely prejudiced" by EPA's shifting, inconsistent positions concerning its Section 7(a)(2) responsibilities. (Def. Br. at 28.) However, after the court of appeals allowed Arizona and Petitioner National Association of Home Builders to intervene below, they squarely raised and briefed the legal issue of whether EPA was required to approve Arizona's application to administer the NPDES program because Arizona met the criteria for approval under Section 402(b) of the Clean Water Act. (Brief of Intervenor State of Arizona at 1, Nos. 03-71439 & 03-72894 (9th Cir. 2003)); Intervenors-Respondents Home Builders' Answering Brief

at 34, Nos. 03-71439 & 03-72894 (9th Cir. 2003)). And, Respondents fully addressed the issue. (Petitioners' Reply Brief at 25-29.) Therefore, Respondents cannot legitimately claim prejudice when they have been given the opportunity both in the court of appeals and this Court to address this legal argument.

Respondents also argue that the Court should remand to give the public the opportunity to comment on EPA's clarification of Section 7(a)(2)'s application to approvals of state NPDES programs. (Def. Br. at 28-29.) Although the public has the right to comment on an agency's promulgation, modification, or repeal of a rule (*see* 5 U.S.C. § 551(5)), "there is no barrier to an agency altering its initial interpretation [of a statute] to adopt another reasonable interpretation – even one that represents a new policy response generated by a different administration." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 863 (1984)). Because EPA has not changed its interpretation of its rules, there is no need to remand for public comment.

Finally, Respondents argue that the Court should remand because they would have challenged EPA's decision to partially fund Arizona's NPDES program if they had known that EPA would take the position that Section 7(a)(2) did not apply to its decision to approve the program. (Def. Br. at 30.) This argument has no merit.

First, Respondents cannot blame their failure to raise all relevant issues below on EPA. As noted above, Arizona and National Association of Home Builders put Respondents on notice of their interpretation of Section 7(a)(2). Moreover, FWS's Biological Opinion put Respondents on

notice that FWS believed that the Clean Water Act granted States the right to administer NPDES programs even if such approval would result in a loss of conservation benefits. (NAHB Pet. App. 114.)[2]

Second, once EPA determined that it would approve Arizona's program because it met Section 402(b)'s requirements, its additional decision to provide funding would not require consultation under Section 7(a)(2). Such consultation is triggered by the requirement that EPA "insure" that "any action" that it "fund[s]" is "not likely to jeopardize" any endangered or threatened species or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). Although increased construction may affect terrestrial upland species, the action funded – the Arizona NPDES program – is not likely to jeopardize any endangered or threatened species or adversely modify critical habitat. (*See* NAHB Br. at 45-46 and the Brief of Amici Curiae High Production Homebuilders in Support of Petitioners for an in-depth discussion of when agency action triggers Section 7 consultation.)

In sum, the Court should not remand this matter to EPA because any inconsistencies in EPA's decisionmaking involve the interpretation of federal statutes and are therefore appropriate for this Court's review. And, this Court's guidance on this important question is necessary to resolve the conflict between the circuit courts.

---

[2] In its Biological Opinion, the FWS stated: "Further, loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act." *Id.*

II. Section 7(a)(2) Does Not Apply to EPA's Decision to Transfer Pollution Permitting Authority to Arizona.

Respondents selectively focus on language, legislative history, and decisional authority that seemingly supports their argument that Section 7(a)(2) applies to EPA's decision to transfer pollution permitting authority to Arizona under Section 402(b) of the Clean Water Act. But Respondents simply ignore statutory language, legislative history, and decisional authority that show that Congress intended the transfer provisions of Section 402(b) to be mandatory and did not intend to expand agencies' authorities when it enacted the Endangered Species Act. Respondents' construction of Section 7(a)(2) is wrong because it is contrary to Congress's intent.

A. Because the Language of Section 7(a)(2) Is Susceptible to Different Interpretations, the Court Should Look to Its Legislative History to Determine Congress's Intent.

Respondents argue that the plain language of Section 7(a)(2) and its relationship to Section 7(a)(1) show that it applies to nondiscretionary agency actions. (Def. Br. at 34-35.) But Respondents ignore Section 7(a)'s legislative history that is contrary to their argument. Because the language of Section 7(a)(2) is susceptible to different interpretations, the Court should examine its legislative history to ascertain Congress's intent and defer to the reasonable interpretation of the agency responsible for enforcing the statute.

The EPA acknowledges that it stated that it was required to consult under Section 7(a)(2) before approving

Arizona's application to administer the NPDES program in the administrative proceeding below. (EPA Br. at 45.) EPA also acknowledges that its characterization of Section 7(a)(2) is "not consistent with the relevant federal agencies' understanding of Section 7(a)(2) as reflected in the FWS/NMFS regulations . . . and in more recent agency pronouncements." (EPA Br. at 45.) That EPA's history of interpreting Section 7(a)(2) reflects two different interpretations does not show a disingenuous litigation strategy, as suggested by Respondents; rather it shows that the language of Section 7(a)(2) is susceptible to more than one interpretation.

Given the ambiguity in Section 7(a)(2)'s language, the Court must ascertain if the interpretation of the agency responsible for enforcing the statute is contrary to congressional intent as determined by traditional rules of statutory construction. *Chevron,* 467 U.S. at 843 & n.9. Instead of recognizing this and addressing the portion of Section 7(a)'s legislative history that is discussed in Petitioners and Arizona's briefs, Respondents ignore it.[3]

The legislative history of Section 7(a) shows that Congress intended the phrase "utilize their authorities" to modify both the requirement that is now contained in Section 7(a)(1) and the requirement that is now contained in Section 7(a)(2) and that Congress intended no substantive change when it later separated the requirements into two subsections. (*See* Ariz. Br. at 14-16; EPA Br. at 29-34; NAHB Br. at 35-37.) Thus, the legislative history does not

[3] Respondents argue that the 1978 amendments to Section 7(a)(2) support their interpretation of Section 7(a)(2) because Congress ratified this Court's interpretation of Section 7(a)(2) in *TVA v. Hill,* 437 U.S. 153 (1978). This argument fails because *TVA v. Hill* does not support Respondents' interpretation. *See* argument in Section II(B) *infra.*

support Respondents' argument that the limitation in Section 7(a)(1) that agencies "utilize their authorities" indicates that Congress did not intend to similarly limit the agencies' responsibility under Section 7(a)(2). Instead, the legislative history supports FWS's regulation that construes Section 7(a)(2) to apply only to discretionary agency actions. *See* 50 C.F.R. § 402.03 ("Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.").

Respondents argue that the Court should not defer to FWS's interpretation of the scope of Section 7(a)(2), even though it is the agency responsible for enforcing the Endangered Species Act, because EPA did not rely on it in the Ninth Circuit. (Def. Br. at 45.) However, Arizona relied on 50 C.F.R. § 402.03 in arguing that Section 7(a)(2) did not apply to EPA's approval of Arizona's NPDES program because EPA lacked discretion to deny approval if Arizona met the requirements of Section 402(b). (Brief of Intervenor State of Arizona at 14-16, Nos. 03-71439 & 03-72894 (9th Cir. 2003)). And, the court of appeals addressed the argument. (NAHB Pet. App. at 39-41.) Because the enforcing agencies' regulation, 50 C.F.R. § 402.03, is a reasonable interpretation of Section 7(a)(2) that is consistent with Congress's intent, the Court should defer to it. *Chevron*, 467 U.S. at 844.

B. This Court's Decision in *TVA v. Hill* Does Not Support Respondents' Construction of Section 7(a)(2).

Respondents also argue that *TVA v. Hill,* 437 U.S. 153 (1978), supports their expansive interpretation of Section 7(a)(2). (Def. Br. at 38-39.) But Respondents fail to address the significant distinctions between this case and *Hill.* Those distinctions are fatal to Respondents' argument.

First, *Hill* involved TVA's discretionary action. The Court found that the lump-sum congressional appropriations to TVA did not require TVA to complete the Tellico Dam even though its completion would violate Section 7 of the Endangered Species Act. 437 U.S. at 189-93. Second, *Hill* construed the language of Section 7 as it was originally enacted in 1973, *id.* at 160, and thus addresses whether a federal agency must comply with Section 7 when it is acting within its existing authority, *id.* at 164 n.14. Therefore, *Hill* does not support Respondents' argument.

CONCLUSION

This Court should vacate the judgment of the court of appeals and uphold EPA's approval of the Arizona's pollution permitting program.

DATED: April 9, 2007

Respectfully submitted,

TERRY GODDARD
Attorney General of Arizona

MARY O'GRADY
Solicitor General

PAULA S. BICKETT
Counsel of Record
Chief Counsel, Civil Appeals

JAMES T. SKARDON
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-3333
Counsel for State of Arizona